

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 _____
5 GEORGIA-PACIFIC CONSUMER
6 PRODUCTS, LP; FORT JAMES
7 CORPORATION; and GEORGIA-PACIFIC,
8 LLC,

9 Plaintiffs,

DOCKET NO. 1:11-cv-483

10 vs.

11 NCR CORPORATION;
12 INTERNATIONAL PAPER COMPANY; and
13 WEYERHAEUSER COMPANY,

14 Defendants.
15 _____/

16 TRANSCRIPT OF HEARING ON MOTION TO COMPEL
17 BEFORE UNITED STATES MAGISTRATE JUDGE HUGH W. BRENNEMAN, JR.

18 GRAND RAPIDS, MICHIGAN

19 October 30, 2014

20 Court Reporter: Glenda Trexler
21 Official Court Reporter
22 United States District Court
23 685 Federal Building
24 110 Michigan Street, N.W.
25 Grand Rapids, Michigan 49503

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computer-aided transcription.

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Grand Rapids, Michigan

October 30, 2014

9:41 a.m.

P R O C E E D I N G S

THE COURT: Good to see you gentlemen again.

MR. McATEE: Good morning, Your Honor.

MR. NYFFELER: Good morning, Your Honor.

THE COURT: My wife wonders about this Georgia I keep talking about in my sleep at night. I tell her it's the name of a case, not another woman.

MR. McATEE: A fine distinction.

THE COURT: As well as a jealous mistress. I told her this is the last motion I have on my docket in this case as far as I know. She suggested that perhaps I am close to atoning for whatever I did in a past life that has required this case to come on my docket. But then my judicial assistant, my secretary, tells me that we're scheduled for a settlement conference or perhaps two settlement conferences in this case coming up in the spring and the summer, so perhaps I'm not as close to atoning as I thought I might be and I still have some more work to do.

Anyway, this is the plaintiff's motion to compel production of documents and interrogatory responses from NCR, and I think we're talking about in particular some insurance settlement agreements pertaining to two specific requests.

1 I had a chance to read the plaintiff's motion and the
2 supporting brief and NCR's response. So, counsel, any time
3 you're prepared.

4 *MR. NYFFELER:* Your Honor, Paul Nyffeler with
5 Hunton & Williams for Georgia-Pacific.

6 *THE COURT:* Good morning.

7 *MR. NYFFELER:* May it please the Court, as you just
8 said, Your Honor, we're here today to discuss the motion
9 requesting the Court to compel NCR to produce insurance
10 settlement agreements and indemnification agreements that NCR
11 has thus far refused to produce on the grounds that the
12 information sought is irrelevant and subject to strict
13 confidentiality requirements.

14 We contend that the information is relevant and that
15 granting Georgia-Pacific's motion in conjunction with the
16 protective order entered in this case that NCR joined resolves
17 all outstanding confidentiality concerns.

18 With regard to the relevance of this information, we
19 cited in our brief the case United States versus Davis written
20 by Judge Torres in the District of Rhode Island, and he was
21 presiding over a CERCLA case and outlined four critical issues
22 or factors that can be used in equitable allocation for CERCLA
23 litigation. And those four factors were the extent to which
24 cleanup costs are attributable to wastes for which a party is
25 responsible, the party's culpability, the degree to which the

1 party benefited from the disposal of the waste, and the party's
2 ability to pay its share of the costs.

3 Now, with regard to this fourth factor, the ability
4 to pay, this factor is relevant in equitable allocations
5 because assigning an equitable share in excess of a potentially
6 responsible party's ability to pay would only harm the parties
7 seeking contribution.

8 In this case the discovery that Georgia-Pacific seeks
9 is not to increase or decrease NCR's share of liability. In
10 fact, Georgia-Pacific maintains that NCR's liability for
11 cleaning up the Kalamazoo River should be 100 percent. The
12 purpose is to ensure that if NCR eventually goes the way of
13 Plainwell or Allied, Georgia-Pacific will not be left holding
14 the check.

15 Now, in the Millennium Holdings bankruptcy --

16 *THE COURT:* Can you be a little more specific about
17 that when you say goes the way of these other two companies for
18 the uninitiated?

19 *MR. NYFFELER:* Sure. Allied and Plainwell were two
20 former mill owners within the site that have subsequently filed
21 for bankruptcy. In fact, the Allied Corporation ended up
22 passing through the Millennium Holdings Corporation, and that
23 was actually the entity that actually filed bankruptcy. But
24 initially those two entities were involved in paying to help
25 clean up the site, but after the bankruptcy they were no longer

1 assisting.

2 *THE COURT:* So if NCR should suffer the same fate,
3 you want to know there is adequate insurance to take their
4 place?

5 *MR. NYFFELER:* What we're really -- yes, but what
6 we're really looking for is not whether there's adequate
7 insurance. What we need to know is if they are not going to be
8 able to pay 100 percent of the costs, then we're going to have
9 to -- we're going to have to come up with a way to allocate the
10 existing costs amongst the other defendants. So if, for
11 example, NCR is assigned 100 percent but then eventually is
12 only able to pay 50 percent, Georgia-Pacific, we don't want to
13 be left paying the remaining 50 percent. We would like to be
14 able to make sure that the other defendants also are involved
15 in helping pay to clean up the site.

16 So actually -- in the Millennium Holdings bankruptcy
17 actually, the United States' proof of claim for the cleanup of
18 the site was \$2.6 billion plus interest. And I checked
19 yesterday, NCR's market capacity, and Bloomberg said it was
20 4.6 billion. So if the Court were to require NCR to pay
21 100 percent of the cleanup costs at the site, as
22 Georgia-Pacific believes should be entered, NCR's share would
23 be more than half of its current market capacity. And that's
24 just for the Kalamazoo River site. NCR is also involved in
25 some other sites as well. So Georgia-Pacific needs this

1 information to make sure that NCR in fact will be able to pay
2 the allocation that it's assigned.

3 Now I want to walk through a little bit of history
4 because some things have happened since the motion has been
5 filed. So initially NCR disclosed in their Rule 26 disclosures
6 that they would make available their insurance policies.
7 Georgia-Pacific then served -- on June 26th served one
8 interrogatory amongst a set of other interrogatories and one
9 request for production in a set of other requests for
10 production addressing the insurance and indemnification
11 agreements. Now, by comparison previously NCR had actually
12 served over 20 interrogatories relating to Georgia-Pacific's
13 insurance. And in doing so, Georgia-Pacific also had
14 confidentiality concerns with their insurance settlement
15 agreements and we couldn't produce it without a protective
16 order. So the parties got together and everyone stipulated to
17 a protective order to protect the confidential information in
18 the case. And that was docket number 447 entered on
19 April 14th. And after the protective order Georgia-Pacific
20 produced the documents NCR was seeking, including
21 Georgia-Pacific's insurance agreements. The settlement
22 agreements.

23 *THE COURT:* Just a moment.

24 *MR. NYFFELER:* Yes, sir.

25 *THE COURT:* Go ahead.

1 MR. NYFFELER: All right. Now, when NCR responded to
2 our Request for Production, of all the requests for production
3 they had a format. They would have -- underneath the request
4 they would put a little line that said "Objection" and then
5 they would state their objection, and then they would put
6 "Response" and they would put their response. Now, in all
7 those cases of the requests for production except the last one
8 they actually had an objection and a response.

9 For the request for production for the insurance
10 materials they had an objection but they didn't lodge a
11 response. They just left it open. And also in response to our
12 interrogatory on the insurance matters, they referred us to its
13 public filings made with the Securities and Exchange
14 Commission. NCR did not say what year or which filing to look
15 at. And as far as I know at least at the time NCR had never
16 produced any SEC filings in the case. So on August 27 -- and
17 this is actually in the --

18 THE COURT: So there's no response to what was
19 request number 9?

20 MR. NYFFELER: I believe it's request --

21 THE COURT: There was request number 10 and then
22 there was request number 9 to produce. Which one had no
23 response to it besides the objection?

24 MR. NYFFELER: It was -- one moment.

25 THE COURT: You just told me and I didn't write it

1 down.

2 MR. NYFFELER: Yeah, it was request number 9. Yes.

3 THE COURT: Request number 9 --

4 MR. NYFFELER: "Produce all agreements and other
5 documents or communications, including any insurance policies,
6 judicial decisions, contracts, arbitration awards, settlement
7 agreements, and/or other indemnification agreements under which
8 any party is, would be, or alleged is or would be obliged to
9 pay, in whole or in part, NCR's court-determined share of any
10 past or future costs associated with the site."

11 THE COURT: All right. And that's one of your
12 exhibits here, I believe.

13 MR. NYFFELER: Correct. It's Exhibit E. Well, E was
14 their response. Which also includes the request itself.

15 THE COURT: Well, they filed their objection and no
16 further response.

17 MR. NYFFELER: That's correct. All right. So --

18 THE COURT: And then as far as interrogatory number
19 10 -- which exhibit is that?

20 MR. NYFFELER: Well, only the answer actually is part
21 of D. We didn't actually get the question. I think that's in
22 C.

23 But their response in there was subject to and
24 without waiving these objections or any of its general
25 objections, NCR states that extensive information concerning

1 its insurance policies proceeds and indemnification
2 arrangements related to its environmental matters is discussed
3 in its public filings made with the Securities and Exchange
4 Commission.

5 *THE COURT:* Right. Okay. Go ahead.

6 *MR. NYFFELER:* So on August 27th we sent a letter to
7 NCR laying out the reasons that their response was deficient.
8 At that time we also laid out the reasons why we thought the
9 information was relevant with the U.S. v. Davis case.

10 We had a meet and confer on September 5th and NCR
11 came back and said, you know, "We would really like you to look
12 at the SEC filings and ask us if there's anything else you
13 really need. We would like you to come back before you file a
14 motion to compel. We'd like to sort of keep this process
15 open."

16 So at the time NCR really didn't address the U.S.
17 versus Davis case. They said they were not willing to put
18 NCR's ability to pay at issue in the case.

19 Now, we went out and we reviewed the SEC filings, and
20 they did not in fact provide the information that we were
21 seeking.

22 We sent them a second letter on September 26th laying
23 out the reasons it was deficient.

24 On September 30th NCR stated that it was going to
25 stand on its relevance objections.

1 And then on October 2nd we filed our Motion to
2 Compel. And at that time NCR had still never responded to our
3 requests for production for insurance and indemnification
4 materials. And also NCR had still not made its insurance
5 policies available which it said it would do in its initial
6 disclosures.

7 Now to the stuff that is not in the briefs,
8 Your Honor. On October 13th we held another meet and confer at
9 the request of NCR's attorneys.

10 *THE COURT:* October 13th?

11 *MR. NYFFELER:* Yes, sir. On this call NCR's
12 attorneys offered to produce NCR's insurance policies which
13 they admitted were not in fact confidential. We asked whether
14 they would produce the settlement agreements. NCR said they
15 were not allowed to produce them. We asked them why the
16 protective order would not meet NCR's confidentiality needs,
17 and NCR said that the settlement agreements forbid their
18 disclosure.

19 We asked if we could get around it by having them
20 summarize the terms for the settlement agreements. NCR said
21 the settlement agreements forbid disclosing the terms.

22 On October 17th NCR contacted us again. This was
23 three days before their responsive brief was due. NCR at that
24 time then produced the insurance agreements. I'm sorry, not
25 the insurance agreements, the insurance policies. And it said

1 that NCR has produced all of its indemnity agreements except
2 for one. And NCR said that this last indemnity agreement will
3 be produced shortly. And they did not suggest that there would
4 be any limitation on its production.

5 Now, at this time NCR offered to disclose the
6 aggregate amount of any insurance settlement for which the
7 Kalamazoo site was arguably covered and the amount of that
8 aggregate which NCR had actually applied to the site and for
9 which costs. NCR maintained that it would not be producing its
10 insurance settlement agreements. Now, the problem that we had
11 is without the settlement agreements, Georgia-Pacific has no
12 way to know how the insurance settlements will be applied to
13 the Kalamazoo site, if at all. It's entirely possible that the
14 settlement agreements include provisions that limit
15 distributions to certain individual sites. It's possible the
16 settlement agreements require additional arbitrations. The
17 bottom line is, without these settlement agreements we have no
18 way to know how any insurance payments can and will be applied
19 to cover past and future cleanup costs at the site if NCR is
20 required to pay them.

21 We also asked why NCR was unable to simply send the
22 documents as we requested given that there was a protective
23 order in the case. And NCR replied, "Because we need consent
24 of all insurers which I have been unable to abstain." And I
25 don't know, Your Honor, if that means that some of the insurers

1 actually agreed or not. It's not really clear.

2 *THE COURT:* So on October 17th NCR did produce the
3 insurance policies, and I thought I heard you say they also
4 produced some indemnification agreements but not all of them.

5 *MR. NYFFELER:* Actually, they pointed out that they
6 had produced some of them but not all of them.

7 And at that time because --

8 *THE COURT:* Did you know they had produced some but
9 not all?

10 *MR. NYFFELER:* We had seen some of the older ones,
11 yes.

12 *THE COURT:* So these are not the same as the
13 settlement agreements?

14 *MR. NYFFELER:* No, the things that he was talking
15 about that were produced were the indemnification agreements.
16 And the settlement agreements we're talking about are for
17 insurance.

18 *THE COURT:* And how many settlement agreements did
19 you understand there to be? I think I've seen a number.

20 *MR. NYFFELER:* Um, there's -- I think there was
21 litigation involving 25 insurers. I'm not really sure how many
22 insurance settlement agreements there are.

23 *THE COURT:* I thought I saw a number around 19 or
24 something like that.

25 *MR. NYFFELER:* That could be.

1 *THE COURT:* All right. So none of those have been
2 produced as far as you know?

3 *MR. NYFFELER:* No, sir.

4 *THE COURT:* And that's really what is at issue today?

5 *MR. NYFFELER:* Correct.

6 *THE COURT:* Now, you had settlement agreements as
7 well.

8 *MR. NYFFELER:* Yes, Your Honor.

9 *THE COURT:* And you have produced yours subject to
10 that protective order?

11 *MR. NYFFELER:* That's correct.

12 *THE COURT:* And you understood when you entered into
13 that protective order that they were going to produce their
14 settlement agreements as well subject to that protective order?

15 *MR. NYFFELER:* At the time we hadn't actually served
16 discovery on that yet I don't believe. But that was our
17 understanding, yes, that it would apply both ways.

18 *THE COURT:* Why did you feel you needed a protective
19 order for your settlement agreements?

20 *MR. NYFFELER:* My understanding is that the
21 settlement agreements had confidentiality provisions in them
22 that required us to seek a protective order.

23 *THE COURT:* Why did they have confidentiality
24 provisions in them?

25 *MR. NYFFELER:* I'm not sure that I'm aware of the

1 exact reasons other than that's what the insurance companies
2 required.

3 *THE COURT:* You don't know why the insurance company
4 wanted those confidentiality provisions?

5 *MR. NYFFELER:* Not right here, no, Your Honor.

6 *THE COURT:* So I assume you don't know why they would
7 want them as far as the NCR settlement agreements.

8 *MR. NYFFELER:* No, Your Honor.

9 *THE COURT:* Would the insurance companies want to
10 keep the insurance policies themselves confidential if they
11 could?

12 *MR. NYFFELER:* I'm not sure I know the answer to
13 that. I know that a number of insurance policies have been
14 produced in this case by Georgia-Pacific and the other parties
15 as well.

16 *THE COURT:* Well, 26(a)(1) pretty much mandates they
17 have to do that.

18 *MR. NYFFELER:* Right.

19 *THE COURT:* Of course, the insurance companies would
20 be aware of that. There is some case law that suggests that
21 Rule 26(a)(1) is limited to insurance policies and not
22 settlement agreements.

23 *MR. NYFFELER:* That's correct, Your Honor. It's in
24 the notes actually following Rule 26. Of the initial
25 disclosures. That doesn't affect whether they are discoverable

1 or not.

2 *THE COURT:* But I have yet to hear your reason why it
3 should be confidential, other than the insurance companies
4 might like to keep it that way. So I thought that's why I
5 would ask you why you wanted to keep it confidential. And
6 again we're coming back to the circle that it's some insurer
7 that wants to keep it confidential.

8 *MR. NYFFELER:* I think that's correct, Your Honor.

9 *THE COURT:* All right. Go ahead.

10 *MR. NYFFELER:* All right. So on Monday,
11 October 20th, NCR did two things. First they filed
12 supplemental discovery responses, including for the first time
13 an actual response to Georgia-Pacific's Request for Production
14 of Documents relating to NCR's indemnification and insurance
15 agreements. However, in that response it still refused to
16 produce the insurance settlements claiming that they are
17 subject to strict confidentiality restrictions.

18 In their interrogatory response which they also
19 supplemented, they went into greater detail. They listed dates
20 ranges for the arbitration agreements that had been produced.
21 They still pointed to the SEC filings and still included some
22 of the language that we had pointed out was rather vague. For
23 example --

24 *THE COURT:* Do I have copies of those?

25 *MR. NYFFELER:* Yes, Your Honor. They were included

1 as exhibits in NCR's response. Their interrogatory response is
2 Exhibit 1. And once you find it, their answer begins on
3 page 20.

4 *THE COURT:* Page 20?

5 *MR. NYFFELER:* Page 20, yes.

6 *THE COURT:* So this supplements interrogatory
7 number 10?

8 *MR. NYFFELER:* Correct.

9 *THE COURT:* When I read this I wasn't entirely sure
10 what these cost-sharing agreements were. Are these the
11 settlement agreements you're talking about, or are these
12 indemnification agreements that you had mentioned earlier?

13 *MR. NYFFELER:* Well, so on page 21, the cost-sharing
14 agreement, our understanding is that is the outcome of an
15 arbitration or a litigation that occurred between NCR, API, and
16 British American Tobacco, BAT. So the lists at least in the
17 bullets on page 21 as far as we understand relate to the
18 outcome of arbitrations.

19 *THE COURT:* All right.

20 *MR. NYFFELER:* And also --

21 *THE COURT:* So those are or are not the settlement
22 agreements that you are seeking?

23 *MR. NYFFELER:* Those are not what we're talking about
24 specifically, because those are for the indemnification
25 arrangements, not the insurance settlement agreements.

1 *THE COURT:* All right. So --

2 *MR. NYFFELER:* And then they also point out at the
3 bottom of 21 that there's the last arbitration -- I'm sorry --
4 indemnification agreement. This is the -- "A Form 8-K filed by
5 NCR announced on September 30th of 2014 NCR entered into a
6 funding agreement with Appvion, formerly known as
7 Appleton Papers, Windward Prospects, BAT Industries, and BTI
8 2014."

9 This is -- if you follow a little further, it says
10 NCR will produce the funding agreement in redacted form once it
11 is publicly disclosed by Appvion.

12 It doesn't --

13 *THE COURT:* You will get it once the public gets it?

14 *MR. NYFFELER:* I guess, Your Honor. It doesn't
15 explain why it has to be redacted.

16 *THE COURT:* It's nice to know that you're at least
17 second in line to the public.

18 *MR. NYFFELER:* Yes. All right. So on
19 October 20th --

20 *THE COURT:* Is that a settlement agreement?

21 *MR. NYFFELER:* Is this --

22 *THE COURT:* Is that referring to a settlement
23 agreement?

24 *MR. NYFFELER:* I believe we would call this an
25 indemnification agreement. This is what they said --

1 *THE COURT:* All right. So let's talk about
2 settlement agreements.

3 *MR. NYFFELER:* Yes, sir.

4 *THE COURT:* Is there any settlement agreement talked
5 about? I'm looking at the very last paragraph. It says,
6 "Finally NCR has identified 19 settlement agreements," and I
7 guess that's where I got the 19, "that it entered into with 25
8 insurance carriers. These are strictly confidential. NCR has
9 contracted with these carriers when it entered into these
10 confidential settlement agreements and informed them of
11 interrogatory number 10. The insurers have thus far refused to
12 consent to disclose these."

13 So it sounds like those are still off-limits and have
14 not been furnished to you.

15 *MR. NYFFELER:* That's correct.

16 *THE COURT:* All right. So the supplemental discovery
17 still has not furnished you what you're asking for today.

18 *MR. NYFFELER:* Exactly, Your Honor.

19 *THE COURT:* All right. Go ahead.

20 *MR. NYFFELER:* So the second thing they did on
21 October 20th was to file their responsive brief. They first
22 argued -- NCR argued that Georgia-Pacific's Motion to Compel is
23 moot because NCR offered to provide some information at some
24 later date without actually disclosing that information
25 directly.

1 NCR maintains that its settlement agreements are
2 irrelevant. As we pointed out too, they said that they would
3 be producing the last indemnification agreement in a redacted
4 form but didn't explain why it had to be redacted. And they
5 actually didn't say a specific date when it would be produced.
6 Just some time in November they understood.

7 NCR continues to maintain that the information sought
8 is subject to strict --

9 *THE COURT:* So the record is going to be produced in
10 November why?

11 *MR. NYFFELER:* Our understanding, what it said, is
12 that one of the other parties, Appvion, will be releasing it to
13 the public.

14 *THE COURT:* So because we have to allow the public to
15 see it first?

16 *MR. NYFFELER:* I guess, Your Honor.

17 Now, as we said, NCR maintains that this material is
18 strictly confidential and that it is contractually unable to
19 produce this information without a court order. And NCR also
20 disclosed at least some of the terms of the settlement
21 agreements in its brief, namely, the terms that say they are
22 not allowed to disclose it short of a court order.

23 So I guess, Your Honor, the real issue here today
24 that needs to be addressed is whether the material is actually
25 relevant. And if we assume for a moment that this discovery is

1 relevant, then the only outstanding issue is that the material
2 sought is confidential and that NCR cannot produce this without
3 a court order.

4 Now, this problem again is very similar to when NCR
5 requested the same settlement agreements from Georgia-Pacific
6 and Georgia-Pacific obtained the protective order with the
7 consent of all the parties because its insurance agreements
8 also had strict confidentiality requirements. And once the
9 order was entered, then the information could be produced. And
10 I have not heard any suggestion from NCR that the protective
11 order entered into in this case isn't sufficient to protect its
12 confidentiality obligations.

13 And if it is indeed the case that NCR needs an order
14 from this Court to compel production with NCR's receipt, then
15 that's exactly what our motion seeks to do. So if the
16 discovery is relevant, then this Court's motion and the
17 protective order should resolve all outstanding issues.

18 Now, as we discussed previously, this discovery that
19 we seek is not marginally relevant as NCR suggests, but it's
20 critical to understanding the needs of an allocation of past
21 and future costs at the site.

22 Now, NCR in their brief argues that the discovery
23 sought is irrelevant because NCR is not asserting a claim for
24 costs in contribution. However, as we said, that's not why
25 we're seeking this information. Georgia-Pacific intends to

1 prove in this case that NCR should be held 100 percent liable
2 for all past and future costs associated with cleaning up the
3 site.

4 Now, we seek this information under the fourth factor
5 from Judge Torres in the Davis case in order to know ahead of
6 time whether NCR is actually capable of paying for 100 percent
7 of the cleanup costs at the site. And NCR in their brief cites
8 two court cases which are actually informative to explain why
9 we need this and why NCR's objections are not going to be --
10 are not adequate.

11 They cited the Lockheed Martin versus the
12 United States case, and we believe actually this is very
13 informative as to why Georgia-Pacific needs this information.
14 As NCR wrote in its brief, "The Torres ability-to-pay factor is
15 not an open invitation for courts to increase or decrease a
16 party's equitable share based solely on net worth but is
17 instead meant to recognize that a PRP's share of liability
18 should not be established at a level that exceeds its
19 resources, lest the plaintiff be left to shoulder that PRP's
20 equitable share."

21 As I said, Georgia-Pacific is not seeking this
22 information to increase or decrease NCR's equitable share based
23 solely on net worth. Georgia-Pacific --

24 *THE COURT:* Just a moment.

25 *MR. NYFFELER:* Yes, sir.

1 **THE COURT:** Go ahead.

2 **MR. NYFFELER:** Georgia-Pacific needs to know if they
3 are actually capable of shouldering 100 percent of the costs at
4 the site. Because if they are capable of only paying say
5 50 percent of the costs, NCR if it goes the way of Plainwell or
6 as we said of Allied or Millennium Holdings, Georgia-Pacific
7 should not be left to shoulder the remainder as it was said in
8 Lockheed Martin.

9 Now, the other case that NCR cites in their brief is
10 Ryland Group versus Payne --

11 **THE COURT:** They are going to say we'll pay the total
12 amount that the insurance will supply under this confidential
13 settlement agreement. The insurance policies may say that
14 there's X amount of insurance, the settlement agreements will
15 say there's Y, but Y is available, so now you know how much is
16 available. Plus you know our assets because you looked them
17 up. So that's what we've got available. What more do you
18 need?

19 **MR. NYFFELER:** Well, the problem is, first of all, we
20 don't know what the settlement agreement -- the insurance
21 settlement agreements say about how the costs should be
22 allocated amongst the different sites that NCR is involved in.
23 So although there might be a certain amount of money involved
24 in the pot of insurance funds, it could be that the insurance
25 settlement agreements allocate, you know, the vast majority or

1 all of it to another site, leaving nothing for Kalamazoo at
2 all. We just don't know.

3 *THE COURT:* What if they say, "We'll tell you that --
4 we'll tell you the amount that's allocated for Kalamazoo"?

5 *MR. NYFFELER:* So far all they have been willing to
6 say is that they are going to -- they would tell us the amount
7 that's been allocated to date in the Kalamazoo site. And so
8 far NCR has not been assigned any costs for cleanup yet. So,
9 again, we're talking about past and future costs, and what they
10 are proposing doesn't get us all the way there.

11 *THE COURT:* Are there other sites that NCR may be
12 responsible for? Is this a real consideration?

13 *MR. NYFFELER:* There's at least one that I'm aware of
14 right now. That's the Fox River litigation going on in
15 Wisconsin. And there may be others as well, Your Honor. I
16 don't know.

17 *THE COURT:* Has there been any determination in this
18 case that NCR is in fact going to have to pay any cleanup costs
19 as far as Kalamazoo is concerned?

20 *MR. NYFFELER:* We had the trial in phase I where NCR
21 was determined to be a liable party. As I understand, phase II
22 is simply going to be about determining past and future costs
23 for cleanup at the site. Who has to pay what. And that's why
24 this information is relevant.

25 *THE COURT:* So is it fair to say that NCR is going to

1 have to pay some money as far as Kalamazoo is concerned?

2 *MR. NYFFELER:* Counsel, may disagree on that point,
3 but that's our position, yes. Our position in fact is that
4 they should pay for all of it.

5 *THE COURT:* I know your position is they should pay
6 all of it. How are they going to be able to argue that they
7 can't -- shouldn't have to pay any of it?

8 *MR. NYFFELER:* Um . . .

9 *THE COURT:* How would they be able to argue that now?

10 *MR. NYFFELER:* Right now all I'm aware of is that the
11 equitable argument they are relating to perhaps the material
12 wasn't all there for all periods of time or something like
13 that. But --

14 *THE COURT:* Wouldn't that affect the amount they
15 would have to pay as opposed to -- as opposed to not paying
16 anything? Could they make an argument that they don't have to
17 pay anything?

18 *MR. NYFFELER:* I don't know if they are going to try
19 to argue that.

20 *THE COURT:* Is that a feasible argument?

21 *MR. NYFFELER:* Given that the judge was clear that
22 for a certain period of time they clearly were an arranger for
23 the disposal of hazardous waste, at least for some time period
24 for at least one mill I don't think they can really argue that
25 they have nothing to pay.

1 *THE COURT:* So if they were to make an argument this
2 morning that there's no obligation proven so far that they have
3 to pay anything, therefore, they shouldn't have to produce any
4 insurance policy numbers -- or pardon me -- any settlement
5 agreement numbers because they haven't been adjudged to have
6 any obligation, you don't think that argument would fly?

7 *MR. NYFFELER:* No, Your Honor. And again, the
8 purpose of the discovery right at this stage is to determine
9 whether they will be able to actually pay or not. So --

10 *THE COURT:* But if they were going to say there's no
11 obligation to pay, then it would be premature to find out if
12 they have the money.

13 *MR. NYFFELER:* Well, again, since they have already
14 been found liable in phase I --

15 *THE COURT:* Uh-huh.

16 *MR. NYFFELER:* -- they will have to pay for
17 something.

18 *THE COURT:* That's what I'm asking.

19 *MR. NYFFELER:* Yes. So they have been liable from
20 1969 to 1971 at a minimum for the Georgia-Pacific Mill. And we
21 contend that it was also for all years, 1954 to 1971 and all
22 locations at the site.

23 And also, Your Honor, if NCR is trying to argue that
24 their liability should somehow be limited, the burden is on
25 them to actually prove that.

1 *THE COURT:* You appeared to concede a few minutes ago
2 that Rule 26(a)(1) does not require them to produce anything
3 other than the insurance policies.

4 *MR. NYFFELER:* In their initial disclosures,
5 Your Honor.

6 *THE COURT:* In their initial disclosures.

7 *MR. NYFFELER:* That's correct, yes.

8 *THE COURT:* So I assume you are not relying strictly
9 on 26(a)(1) to obtain these settlement agreements?

10 *MR. NYFFELER:* No, Your Honor. The information we
11 seek is relevant under the fourth factor of the Torres factors:
12 Their ability to pay.

13 *THE COURT:* So you're seeking this as part of routine
14 discovery in addition to whatever might be mandated by
15 Rule 26(a)(1)?

16 *MR. NYFFELER:* That's correct. This relates to
17 CERCLA liability and equitable allocation of costs at the site.

18 *THE COURT:* Just a routine discovery through
19 interrogatories and production of documents?

20 *MR. NYFFELER:* Correct.

21 *THE COURT:* All right. I think I interrupted you.
22 Go ahead.

23 *MR. NYFFELER:* Oh. Well, the only -- the last point
24 I wanted to make was the other case that NCR cites in its
25 brief, Ryland Group versus the Payne firm. In that case Ryland

1 was the plaintiff and it sued the Payne firm and a man named
2 Mr. Thomas. Now, Mr. Thomas eventually sought some discovery
3 regarding the Payne firm's ability to pay for cleanup costs.
4 The problem for Thomas, however, was that the Court in that
5 case had entered summary judgment capping the Payne firm's
6 liability to Thomas for \$50,000.

7 The plaintiff in that case had also agreed that it
8 would not make the Payne firm's ability to pay an issue in the
9 case. So as that case explains, the only possible relevance of
10 the sought documents would be to prove that Payne is capable of
11 paying an amount greater than it will ever be called upon to
12 pay in this case.

13 Now, the problem for NCR is that those situations and
14 facts do not apply to them in this case. NCR in fact has no
15 such cap on its liability in this case. We are seeking a
16 hundred percent of all costs, past and future.

17 The plaintiff in this case, namely, Georgia-Pacific,
18 also has not necessarily decided whether NCR's ability to pay
19 would be an issue in the case, but we need to have discovery to
20 determine whether we need to make that an issue in the case.
21 Therefore, the discovery that Georgia-Pacific seeks is relevant
22 to prove that NCR is capable of paying the maximum amount that
23 anyone could be called upon to pay at the site, which is a
24 hundred percent of all past and future costs.

25 Now, NCR wishes to cut off this discovery by saying

1 that it has represented to Georgia-Pacific that it does not
2 contest its ability to pay any adverse judgment. However,
3 Georgia-Pacific does not intend to take them at their word on
4 this. Especially when the costs could be as much as half or
5 more of NCR's current market capacity. So if we were to ask
6 what the value would be of the same representation if made by
7 Plainwell or Allied, who are no longer in existence, in
8 hindsight that representation would not be worth very much,
9 which is why Georgia-Pacific wants this information.

10 So, Your Honor --

11 *THE COURT:* So even though they are saying "We're
12 good for it," you're saying, "Well, we don't want to take your
13 word for that"?

14 *MR. NYFFELER:* We want to see some proof, Your Honor.

15 *THE COURT:* All right. Thank you.

16 *MR. NYFFELER:* Thank you.

17 *MR. McATEE:* Good morning, Your Honor.

18 *THE COURT:* Good morning, Counsel.

19 *MR. McATEE:* Darin McAtee from Cravath for NCR. I
20 think I would like to start with the indemnity agreements
21 because I think that's a little bit simpler. There are three.
22 There's a 1998 confidential settlement agreement that's known
23 as the CSA. Under that agreement the costs are shared with
24 Appleton Papers, Inc., also known as API, and British American
25 Tobacco or BAT. That agreement was produced years ago in the

1 Fox River case. By agreement of the parties, anything produced
2 in that case is deemed produced in this case. And so they had
3 it and have had it for years.

4 It is now also described in our supplemental answer
5 to interrogatory number 10. And, frankly, described ad nauseam
6 in our securities filings. It's a very well-known agreement,
7 and they have it.

8 The second agreement is a 1996 trivestiture agreement
9 with AT&T. Under that agreement costs are shared with AT&T and
10 Lucent and NCR. It goes back to their corporate history where
11 they were once upon a time connected companies. That agreement
12 was produced in the Fox River case. Georgia-Pacific has had it
13 for years. By agreement of the parties it was deemed to have
14 been produced in this case with the initial disclosures. And
15 it's now also described in our response to interrogatory
16 number 10 and also in our securities filings.

17 The third agreement is very recent. It almost killed
18 me to get it negotiated. It was the month of September. I
19 literally spent 20 hours a day in September getting it done.
20 It came into existence on September 31st and it was widely
21 disclosed in the press. Georgia-Pacific has the NCR and API
22 press releases. They do not have the actual funding agreement
23 itself because that piece of paper is a very confidential
24 agreement. It covers a lot of different topics, not just the
25 Kalamazoo issue. And it's currently being negotiated among the

1 parties to that agreement as to what can be publicly disclosed.

2 I will represent that none of the redactions that are
3 going to happen are going to relate to the Kalamazoo River.

4 It's things like bank accounts, wiring instructions, strategy
5 for pursuit of third parties, including, frankly,

6 Georgia-Pacific. So it has some things in it that may need to
7 be redacted, but it's not going to relate to this issue, which
8 is how is the money going to be there for Kalamazoo if there's
9 money left over? That agreement needs to be disclosed by API
10 in redacted form the first week of November. And so what I
11 told counsel for Georgia-Pacific is I didn't want to get ahead
12 of the kind of negotiations as to what the redactions should
13 be, but I would give it to them as soon as it was made public
14 by API, which is during the discovery period.

15 So those are the indemnity agreements, Your Honor.

16 *THE COURT:* You have agreed to produce that to
17 Georgia-Pacific by the end of the first week in November?

18 *MR. McATEE:* Yes, Your Honor.

19 *THE COURT:* And you have agreed to produce it to them
20 in redacted form. None of the redactions pertain to the
21 Kalamazoo River and how much money would be available to pay
22 for the cleanup in the Kalamazoo River. There may be some
23 redactions that pertain, however, to what, obtaining money from
24 Georgia-Pacific?

25 *MR. McATEE:* From third parties, including

1 Georgia-Pacific. It's an arrangement whereby these various
2 companies have come together and said we're going to go after
3 these other parties, including Georgia-Pacific, collect what we
4 can, put it all into a big pot and use it to fund first
5 Fox River. And then if at the end of all of that there's money
6 left over, we'll use the money for Kalamazoo. That's what this
7 agreement is.

8 *THE COURT:* Do the redactions pertain to Fox River?

9 *MR. McATEE:* So there may be some redactions, again
10 that's being negotiated, as to the strategy for pursuing
11 parties in Fox River. But, again, in this case they would not
12 be entitled to that. That is confidential between these
13 companies.

14 *THE COURT:* Not the strategies for pursuing the
15 parties, but as far as the amounts that would be available for
16 Kalamazoo, it sounds like that might be impacted by how much
17 money is available for Fox River. You said the remainder goes
18 to Kalamazoo.

19 *MR. McATEE:* I'm sorry, Your Honor, I didn't
20 understand the question. No, the redactions would not relate
21 to the amount of money that's available for Fox River.

22 *THE COURT:* Okay.

23 *MR. McATEE:* That would be publicly disclosed and
24 given to Georgia-Pacific in this case.

25 So I think once they have the redacted agreement,

1 they will have what they need, which is -- what they claim to
2 need -- which is how does this agreement affect NCR's ability
3 to pay for costs on the Fox River if it's adjudicated liable.

4 *THE COURT:* Just a moment, please. What did the
5 interrogatory actually request?

6 *MR. McATEE:* I think it requested a description --

7 *THE COURT:* I'm sorry to interrupt you in answering
8 that. I apologize. You are preferring -- I'm sorry -- you are
9 providing this information in response to which, the request to
10 produce documents or the interrogatory?

11 *MR. McATEE:* Actually both. This funding agreement
12 is described in our supplemental interrogatory response, and it
13 also will be made available in response to the requests for
14 production.

15 *THE COURT:* And do those discovery requests seek
16 specific information to which you are responding or seek the
17 documents themselves?

18 *MR. McATEE:* I think it sought any documents relating
19 to indemnification for Kalamazoo costs. And because this
20 funding agreement, which is primarily a Fox River document, but
21 because at the end of it it says if there's any money left over
22 we'll use that for Kalamazoo, it becomes responsive to their
23 request for information about Kalamazoo indemnification, which
24 is why we are willing to provide it as soon as it's made
25 public.

1 THE COURT: All right. Thank you. Please go on.

2 MR. McATEE: So if I could switch to insurance.

3 There are 53 insurance policies. Those have all now been
4 produced. Forty-two of them were produced in the Fox River
5 case, and, therefore, were deemed to have been produced in this
6 case. And the other 11 were produced with our production in
7 October. What we basically did is took all 53 of those and put
8 them together as one package and then reproduced them in the
9 Kalamazoo case so they would know specifically which 53 were
10 the ones that may provide coverage for Kalamazoo. So they now
11 have that.

12 Your Honor is correct, there are 19 settlement
13 agreements, which are different from the insurance policies.
14 There is strict confidentiality obligations. The settlement
15 agreements do not allow us to disclose if there is a protective
16 order. So if we were to do that, we would risk breach,
17 insurance companies coming to us saying "We want to claw back
18 the money because you violated the terms of the agreement," and
19 that's not a risk that NCR would like to take.

20 The confidentiality issue is broader than the public
21 not being able to see the agreements. What we hear from the
22 insurance companies when we talk to them about this issue is
23 that they also insure Georgia-Pacific and IP,
24 International Paper, and Weyerhaeuser, and if those companies
25 even in the privacy of this litigation had access to the actual

1 settlement numbers that NCR was given, that it would be an
2 advantage to them in their negotiations with the very same
3 insurance companies. So that's the issue that they are
4 concerned about, and that's why they have refused to consent to
5 allow production of the settlement agreements to these parties
6 in this case.

7 What I came up with was an idea that had worked in
8 some other cases where I've done this exact same thing, and
9 that is the idea Your Honor asked counsel for Georgia-Pacific
10 about: What if they had the aggregate information? I could
11 give them a stipulation where I aggregate all 19 settlement
12 agreements and I say "Here is how much was allocated to
13 Fox River, here is how much was allocated to the
14 Kalamazoo River, here is how much was allocated to other
15 places," and I can separate that between indemnity, you know,
16 cleanup costs and defense costs, so I can come up with a piece
17 of paper. Let's say that we had a total of a hundred million
18 dollars in proceeds. 10 million of that was allocated to
19 Kalamazoo. I would just stipulate to that. So then they had
20 their number. If they wanted to know my ability to pay and
21 have to argue about that, they will know that \$10 million of
22 that insurance pot is available for Kalamazoo costs. And I
23 think that gives them everything they need, Your Honor. They
24 don't need to see the specific terms of each agreement or the
25 specific numbers that a particular insurer agreed to. So

1 that's the solution that we would urge Your Honor to adopt.

2 *THE COURT:* You have tendered that solution to the
3 other side, I take it, and they have not agreed to it? They
4 don't think it goes far enough; is that right?

5 *MR. McATEE:* That's right, Your Honor.

6 *THE COURT:* And why do they think that it's not gone
7 far enough? What is it that they are asking for, as you
8 understand it, that you're not willing to give them?

9 *MR. McATEE:* Well, I don't know. I heard counsel say
10 maybe I wasn't offering the specific allocations to sites. In
11 fact, I was. I was intending to make an offer that would allow
12 them to see how much money was there for Kalamazoo. So
13 hopefully that problem is resolved. So the only other thing I
14 heard is that they don't trust us, they don't trust me. And,
15 you know, this would be a stipulation, we would have to do it
16 as officers of the court, we would represent that these were
17 the correct numbers from the agreements. And as I've said,
18 I've done that in many other cases where this was the solution
19 because of the identical problem that I just raised, which is
20 that insurance companies don't want other parties to see what
21 the settlements were.

22 *THE COURT:* Why should this Court be interested in
23 protecting the interests of the insurance companies which are
24 solely a matter of interest to them? I mean, they may have
25 some business reasons for wanting to protect their business

1 secrets. Most businesses have reasons they don't want their
2 secrets known. But be that as it may, why does that trump the
3 litigation in this court? They are not parties to this
4 lawsuit. They are not even here. They haven't filed any kind
5 of brief. They haven't made an argument here. In fact, until
6 you've tendered this argument, nobody else seemed to even know
7 why these confidentiality provisions are put in here. These
8 provisions are put in between the parties to have a voluntary
9 set of handcuffs everybody is putting on themselves and then
10 coming into court and saying, "Look, I can't do this because I
11 have these handcuffs on which, by the way, I put on myself."

12 It's nice that you did that, but these are not
13 restrictions that somebody else has placed on you that you have
14 no control over. You voluntarily assumed them. And they are
15 not particularly persuasive as far as the Court is concerned
16 that if there's no real outside reason, as there sometimes is,
17 for the Court to consider that confidentiality.

18 Again I come back to the fact that, all right, the
19 insurance companies want to protect their business secrets
20 because they have become so big they are insuring everybody.
21 Well, isn't that their problem? Isn't that something they take
22 on as part of doing business? And with all deference to them
23 and their success, why does that trump what we need to address
24 here and what the parties legitimately need to litigate this
25 lawsuit?

1 *MR. McATEE:* So, Your Honor, my answer to that is I
2 think there are competing policy interests. And I'm not
3 suggesting that one trumps the other. The policy that the
4 insurance companies would point to -- and, frankly, I think we
5 would point to, everybody in this room -- is that we want to
6 encourage insurance companies to settle, to pay. And if one of
7 the things that they are going to require to have -- you know,
8 to be willing to, you know, not litigate and to come to the
9 table and put the money up is protection against this scenario
10 where other parties see what NCR has done and try to gain some
11 kind of bargaining advantage, if we have to protect that policy
12 in order to encourage them to settle, then we should do that.
13 As long as there's an accommodation that could be made that
14 gets Georgia-Pacific the information they need in a way that
15 doesn't allow them to see each individual settlement. So I
16 think we can reconcile both of those policies with the solution
17 that we've been talking about, which is the aggregate
18 disclosure of information which doesn't give -- doesn't have
19 the same bargaining advantage problem associated with it but
20 still gives them the ability-to-pay information that they claim
21 they need.

22 *THE COURT:* Perhaps you could describe what the
23 settlement agreements do. You are insured by the insurance
24 company for certain damages you might have to pay caused by
25 your products or something your company does for certain

1 judgments that might be entered against you for damages caused
2 by your company, I suppose, in a very broad sense. What, if
3 you could tell me, do these settlement agreements that the
4 parties keep talking about do? Because nobody has actually
5 even spoken to what these agreements are that everybody seems
6 to be entering into. Either the agreement -- I mean, we start
7 out with the premise that the insurance company has an
8 obligation. Now you've reached some kind of agreement with the
9 insurance company that apparently reconfigures what that
10 obligation is. Perhaps you could kind of describe what that is
11 in hypothetical or general terms.

12 *MR. McATEE:* Sure, Your Honor. So there is usually
13 an underlying policy or set of policies that provide
14 environmental liability coverage.

15 *THE COURT:* Uh-huh.

16 *MR. McATEE:* When we had the Fox River or Kalamazoo
17 problem, we would go to the insurance company and say, "We have
18 this policy that you have issued. We would like for you to pay
19 the costs." They generally say no. They have a variety of
20 reasons. And it depends on the jurisdiction as to how strong
21 those are, but they generally refuse. There's usually
22 litigation, and then there's negotiation that leads to a
23 settlement where the insurance company puts up a sum of money
24 for defense costs and for indemnity costs. There's a release
25 given under the insurance policies so NCR loses its right to go

1 after those insurance companies for those policies for those
2 sites. And then there's the confidentiality provisions that
3 protect disclosure to the public and to parties like
4 Georgia-Pacific. There may be some other things in there as
5 well, but that's the gist.

6 *THE COURT:* The last part of that is what again?

7 *MR. McATEE:* The confidentiality provisions that
8 we've been discussing that protects the individual settlement
9 amounts from getting out to the public or to other parties that
10 the same insurance companies insure for the very same risk.

11 *THE COURT:* All right. So the insurance company
12 insures you, you want to collect the insurance, they say,
13 "Well, no, our policy doesn't say what you think it says." The
14 common problem most people have when they try to collect their
15 insurance.

16 *MR. McATEE:* Amen.

17 *THE COURT:* So then you have to fight the insurance
18 company to get them to pay what you think they already promised
19 to pay. Do they enter into these agreements to forestall that
20 litigation or as a result of that litigation?

21 *MR. McATEE:* I think both.

22 *THE COURT:* In your case what happened?

23 *MR. McATEE:* In this case there was litigation that
24 was settled by these settlement agreements. There were
25 declaratory judgment actions brought for coverage.

1 *THE COURT:* All right. And then was there a final
2 judgment entered that was litigated, or did you as a result of
3 the -- at some point after the declaratory judgment you entered
4 into a settlement to finally resolve the actual dollar amount?

5 *MR. McATEE:* So I'm not the insurance coverage lawyer
6 for NCR, so with that caveat, my understanding is that almost
7 all of these settle before there was some kind of declaration
8 or judgment of liability. There may be one or two examples of
9 higher-level carriers that went to judgment that NCR is still
10 fighting with. But the vast majority of this was settled short
11 of a judgment.

12 *THE COURT:* All right. And so now everybody
13 understands that was a party to that litigation what the
14 insurance company actually has to pay in regard to the
15 Kalamazoo River?

16 *MR. McATEE:* Well --

17 *THE COURT:* Is that right?

18 *MR. McATEE:* Maybe I can put a point on the kind of
19 problem I've been talking about.

20 Let's say that NCR settles with carrier X for \$10 for
21 the Kalamazoo site and carrier X also insures Georgia-Pacific
22 but they haven't settled. And I'm required to give that -- in
23 this litigation I'm required to give Georgia-Pacific my
24 agreement with that carrier that says \$10 is what they are
25 willing to pay me. They now have an advantage in their

1 negotiations with that carrier because they know what NCR paid
2 for their settlement, so they can in their negotiations say,
3 "You paid 10 to NCR, you should give us 10," or 20 or whatever.
4 That's the problem we're trying to stop.

5 *THE COURT:* Well, wouldn't they have a stronger
6 argument -- first of all, they have already entered into an
7 agreement with Georgia-Pacific, haven't they? Because
8 Georgia-Pacific already has settlement agreements with them.
9 Which, by the way, they furnished to you under this protective
10 order.

11 *MR. McATEE:* So I actually don't know if they have
12 settled with all of their insurers already. Georgia-Pacific.
13 They did give their agreements to me, that's true. Their
14 agreements must have had different terms or they may have had
15 consent from their insurance companies. I don't know. But
16 they did give their settlement agreements under the protective
17 order to NCR. That's true.

18 *THE COURT:* And we're really concerned about
19 recognizing this confidentiality because we're inducing the
20 insurance companies to come to the table, but we haven't really
21 been successful in doing that because you had to sue them in
22 the first place to get a declaratory judgment to find out how
23 much they are going to pay you to honor the agreement they
24 entered into in the first place which they didn't pay you on.

25 *MR. McATEE:* That's true.

1 *THE COURT:* So I'm not really encouraged this is
2 going to really get them to cooperate. Now, maybe if they came
3 to the table right away and said, "Yeah, we'll enter into an
4 agreement to honor our first agreement if you keep it quiet."
5 That's one thing. You had to take them to court, drag them
6 through court to get a declaratory judgment, and now they want
7 to preserve that. I'm not sure what policy is being served
8 except -- I'm not sure what policy is being served.

9 Doesn't -- when we look at Rule 26(a)(1), it requires
10 the insurance company to -- or the insurance policy being
11 involved -- and I recognize that's as far as it goes -- there's
12 some language in a case *Excelsior College versus Frye*, a 2006
13 case, and it talks about that rule. And an interesting line
14 that the judge says -- in order that this is exactly what the
15 rule says -- "Rule 26(a)(1) only mandates the production of
16 agreements," meaning insurance policies, "that may create an
17 obligation, not any agreements that may negate such an
18 obligation."

19 Well, just to read that condemns the whole rule as
20 being inadequate. It's like all an insurance policy is is a
21 contract, and the rule says give up the contract, but you don't
22 have to give up any subsequent modification of the contract
23 that may negate what the contract says. What good is that?
24 The whole purpose of discovery is to eliminate surprise. So
25 you have a rule that says, "Well, we don't want you to be

1 surprised by the insurance policy, so give up the insurance
2 policy." But you don't have to give up any modification of the
3 insurance policy that negates it. So that's what the rest of
4 discovery is for. And so we come along now and we have the
5 rest of discovery which says, okay let's get the modifications.
6 In the same spirit it would seem that the rule contemplates, to
7 eliminate surprise. Well, the insurance companies can't
8 protect the policy itself. They can refuse to honor it because
9 they customarily do it seems like. They can drag you through
10 court and make a court tell you what the policy that they
11 drafted in all likelihood says. And now they argue that they
12 are going to keep that quiet. But the rule initially said that
13 policy was not to be kept quiet. I'm having a hard time
14 understanding why the subsequent declaration as to what that
15 policy really says could be kept any more quiet or confidential
16 than the policy itself. If the policy is not supposed to be
17 kept quiet, why should the confidentiality -- why should the
18 agreement as to what a court ultimately says about it or what
19 the negotiation that forestalls the court determination says
20 about it be kept quiet?

21 *MR. McATEE:* The only thing I can think of,
22 Your Honor, is if an insurance company insures four different
23 parties, and it wants to settle with one of them for \$10 but
24 doesn't want the other three to find out, they will want to
25 have a confidentiality provision in the agreement that prevents

1 disclosure to those parties so that the other three don't
2 obtain an unfair advantage. And if the agreements in spite of
3 that get produced routinely in cases like this one --

4 *THE COURT:* They are the ones with the unfair
5 advantage. They have the secrets. They know what they are
6 dealing with with one party versus the other party. If the
7 other parties know what they are doing, then presumably they
8 would have to treat everybody the same, wouldn't they?

9 *MR. McATEE:* Well, it gives the other three parties a
10 negotiating advantage to know what the first settler got.

11 *THE COURT:* Right, so the insurance company would
12 have to treat all three of them the same way.

13 *MR. McATEE:* Perhaps. Or what's more likely to
14 happen is the insurance company is going to say "I'm not even
15 going to settle with the first one because the other three are
16 going to find out, so let's just keep litigating."

17 So I think the policy we're talking about here is
18 encouraging -- and I know they are often recalcitrant -- but
19 encouraging to the extent we can insurance companies to settle
20 with their insureds, put money on the table, and if they
21 bargain for protections, confidentiality protections, honor
22 those to the extent possible while still giving relevant
23 information to a party who wants it. And that's where I come
24 back to the aggregate solution of giving them the aggregate
25 amount so they have the total picture and they can make their

1 arguments but they don't need to know each individual number.

2 *THE COURT:* At the risk of going in a circle, how
3 well did that work with you when you had to sue them and go
4 through a declaratory judgment action to get to that
5 confidentiality agreement?

6 *MR. McATEE:* Well . . .

7 *THE COURT:* If they had come to the table at the
8 outset and said, "Yeah, we'll negotiate with you as long as
9 it's confidential," that's one thing. You had to go through a
10 declaratory judgment to that get to that agreement. So I don't
11 think they came to the table very quickly.

12 *MR. McATEE:* Well, that may be true in those cases,
13 but, you know, they eventually did come to the table, and, of
14 course, NCR wanted the money, so we agreed to their request to
15 keep it confidential from others. And to that extent, I think
16 it encouraged the settlements, albeit belated.

17 *THE COURT:* Okay. Thank you, Counsel.

18 *MR. McATEE:* Thank you, Your Honor.

19 *THE COURT:* A vigorous argument on their behalf
20 should be noted.

21 *MR. NYFFELER:* Rebuttal, Your Honor?

22 *THE COURT:* Yes.

23 *MR. NYFFELER:* So I guess to start out here, you
24 know, Georgia-Pacific wants to point out that it took up this
25 motion to compel before any of these responses and any of the

1 stuff that we're looking at was actually produced by NCR. So
2 the motion to compel was actually necessary to start this whole
3 process going.

4 I guess the question I'd want to ask is, you know,
5 why does NCR specifically care if you grant this motion? I'm
6 not sure I follow this. I understand the insurance companies
7 are the ones that appear to be concerned, but I don't see them
8 here today. And so I don't understand, you know, if they are
9 really concerned, why aren't they here today? And as you point
10 out, Judge, it seems like the insurance settlement agreement --

11 *THE COURT:* Well, if Cravath, Swain & Moore, which is
12 one of the finest law firms in the country is arguing on their
13 behalf, who else are they going to hire that's going to do a
14 better job?

15 *MR. NYFFELER:* I mean -- as you suggest, Judge, I
16 mean, these insurance settlements in some ways are -- it's a
17 contractual attempt to get around the disclosure rules of
18 Rule 26.

19 Now, the purpose of Rule 26 initial disclosures and
20 to disclose these insurance agreements is in fact, as NCR's
21 counsel pointed out, is to encourage settlement. But that's
22 another reason why this information be disclosed to us.
23 Because Georgia-Pacific, if we had this information and knew it
24 was going on, then we might be encouraged to settle with them.
25 So why is this information not available for us to review as

1 well? And it's not a question of whether we trust counsel to,
2 you know, summarize or whatever. I mean, first of all, there's
3 been done a lot of litigations over these very complicated
4 contracts. There's at least 19 of them. I'm sure they are
5 longer than a page. So, I mean, it's not just a question of
6 whether we trust them or not. This is a very complicated
7 process. And, you know, and also too, Your Honor, I will point
8 out that Georgia-Pacific actually responded to NCR's
9 interrogatories about our insurance settlement agreements, and
10 all the information that they asked for we provided that, and
11 we're still fighting to get this information from them. And
12 lastly, Your Honor --

13 *THE COURT:* Were yours subject to confidentiality
14 agreements?

15 *MR. NYFFELER:* I'm sorry?

16 *THE COURT:* Were your settlement agreements, did they
17 contain confidentiality provisions?

18 *MR. NYFFELER:* Yes, Your Honor, they were, and that's
19 why the parties stipulated to the protective order.

20 *THE COURT:* You thought that was sufficient
21 protection under the -- as far as the confidentiality
22 obligations under the settlement agreements?

23 *MR. NYFFELER:* Yes, Your Honor. The whole purpose
24 was to get this in place so we wouldn't have to have the kind
25 of fight we're having right now.

1 *THE COURT:* Okay.

2 *MR. NYFFELER:* And lastly with respect to the
3 redacted Appvion funding agreement that counsel mentioned will
4 be released the first week in November, we don't necessarily
5 agree with the way it's being produced. However, we would ask
6 that an unredacted copy be given to Your Honor so you can
7 review it in camera to determine whether the actual redactions
8 are limited in the way it's been said.

9 *THE COURT:* So that I can determine what?

10 *MR. NYFFELER:* Well, so -- I understand that counsel
11 has said that it's going to be limited -- the redactions are
12 going to be limited maybe to strategy, bank accounts, and
13 things like that. We would ask Your Honor just to take a look
14 at that and make sure --

15 *THE COURT:* Just to take a look at that?

16 *MR. NYFFELER:* -- and make sure that the redactions
17 don't go to the way that the payments are supposed to be
18 disbursed between the Kalamazoo, Fox, and any other sites.

19 *THE COURT:* I appreciate your faith in the Court.
20 And I probably have some spare time between halftime over the
21 weekend. If the football game gets dull, I can just glance at
22 that. But I suspect from the amount of time it took counsel to
23 draft that that's not something that can casually be done. So
24 I'm not sure that that's something I want to take on. I guess
25 I shouldn't try to be facetious about it, but I would rather

1 take counsel's representation as an officer of the court that
2 it contains or doesn't contain what he represents.

3 *MR. NYFFELER:* Do you have any further questions,
4 Your Honor?

5 *THE COURT:* Yes, but it's actually directed to
6 opposing counsel.

7 There's a question I really didn't give you an
8 opportunity to answer because I didn't ask it. And you didn't
9 address it and Georgia-Pacific raised it. When you, or NCR,
10 originally responded in your disclosures under 26(a) language,
11 and I'm not sure if I have it handy here. Yes, here it is. I
12 believe you provided that you said you would make available for
13 inspection and copying any insurance agreement under which an
14 insurance business may be liable to satisfy all or part of a
15 possible judgment in this action or to indemnify or reimburse
16 for payments made to satisfy the judgment.

17 There was no reservation made there that you were
18 limiting that to insurance policies. Rather it was a blanket
19 statement that any insurance agreement would be produced. Why
20 didn't you -- why can't the Court read that and why can't more
21 specifically Georgia-Pacific read that as you giving away the
22 store right then and there?

23 *MR. McATEE:* My answer to that, Your Honor, is that
24 it probably could have been worded better, but the insurance
25 settlement agreements that we're talking about here don't

1 promise to pay a piece of a judgment in any of these cases. So
2 that's the qualifying language that I would point to in the
3 response you just read.

4 We were agreeing -- any agreement that offered to
5 cover a judgment or liability like the insurance policies
6 themselves, we would provide those and did provide those. But
7 these settlement agreements are just a sum of cash to be
8 allocated to certain either cleanup costs or defense costs.
9 They are not a promise to pay a judgment.

10 *THE COURT:* Interesting. Would you run that by me
11 one more time, please? The settlement agreement --

12 *MR. McATEE:* So the --

13 *THE COURT:* The agreement does what again?

14 *MR. McATEE:* So the representation we made in our
15 initial disclosure pleading was that we would provide any
16 insurance agreement under which an insurance business may be
17 liable to satisfy all or part of a possible judgment, and then
18 it goes on.

19 The 19 settlement agreements we've been talking about
20 don't make any insurance companies liable to satisfy all or
21 part of a possible judgment. All they do is settle a claim
22 that the insurance company had to fund response costs or
23 defense costs and then provide a sum of money for NCR to
24 satisfy those past costs. They don't promise to pay a future
25 judgment. But I agree with Your Honor we should have worded it

1 better.

2 *THE COURT:* The original insurance policies do not
3 require payments going forward or these costs?

4 *MR. McATEE:* Yeah, the original insurance policies do
5 say if you have a judgment in the future, if you have costs in
6 the future and they are covered under the policy, the insurance
7 company will pay it. That's what this language in the initial
8 disclosure is meant to pick up.

9 *THE COURT:* But the settlement agreements only agree
10 to pay costs -- I'm sorry -- they don't agree to cover -- they
11 don't agree to cover those costs?

12 *MR. McATEE:* What they generally do is provide a sum
13 of money that NCR can then allocate either to cleanup costs it
14 has incurred or to defense costs. What they don't do is say,
15 "And you know what, in the Kalamazoo case if you have a
16 judgment of X million dollars, we'll pay 10 percent of that" or
17 "50 percent of that." They don't do that. They are just
18 putting a sum of money on the table for NCR to use to fund its
19 costs in exchange for a release of the policy.

20 *THE COURT:* So they put a finite number on the table
21 as opposed to an open-ended amount --

22 *MR. McATEE:* That's right.

23 *THE COURT:* -- going forward.

24 *MR. McATEE:* That's right, Your Honor.

25 *THE COURT:* All right. Thank you.

1 MR. McATEE: Thank you, Your Honor.

2 THE COURT: I don't know if you had anything further
3 since it was your motion.

4 MR. NYFFELER: No, Your Honor.

5 THE COURT: All right. Thank you gentlemen.

6 The issue before the Court is the request by
7 Georgia-Pacific that the Court order NCR to provide discovery
8 in response to Georgia-Pacific's request number 9 of its first
9 phase II request for production to NCR and interrogatory number
10 10 of its first phase II interrogatories. And essentially what
11 we're talking about are these settlement agreements that have
12 yet to be produced being some 19 in number.

13 There's also a remaining indemnity agreement that was
14 just negotiated, in fact apparently is still being negotiated
15 to some extent. As to the latter document, it's agreed that --
16 it's been agreed by NCR that will be produced by the end of the
17 first week in November, which is coming up pretty quickly,
18 today being October 30th. And while it will be redacted, none
19 of the redacted portions pertain to the amount of money
20 available to clean up -- or pertaining to the cleanup of the
21 Kalamazoo River. And as I understand it, this document
22 actually is an indemnity document for other purposes but does
23 touch on the Kalamazoo River, and so it comes into play for
24 that reason. And it's this portion of the document that is not
25 redacted that is really the responsive part to the request. So

1 to the extent that there are some redactions, they do not
2 appear to be germane to what is being sought by the discovery.
3 And I'm willing to take counsel's representation as an officer
4 of the court that that is the case. I am going to decline
5 Georgia-Pacific's invitation to review this document in camera,
6 because in light of that representation, I really don't think
7 that's probably necessary.

8 But the real focus of this motion has been on these
9 19 settlement agreements, and the only reason they have not
10 been produced, as I understand it, is that they contain
11 confidentiality agreements insisted upon by the insurance
12 companies to the agreements, who are parties to the agreements.
13 So these are self-imposed confidentiality agreements entered
14 into between the parties to those agreements. NCR is one party
15 and the insurance companies are the other parties.

16 Of course, one cannot avoid one's discovery
17 obligation simply by entering into a confidentiality agreement
18 with a third party who is not a party to this litigation
19 whereby you promise to keep something secret and then turn
20 around and come to this Court and say, "Well, I promised
21 somebody else I wouldn't talk about that, and, therefore, I
22 can't divulge that information in this litigation, Judge."

23 There does not appear to be any privilege raised or
24 work product raised or anything of that nature raised as a
25 reason for the confidentiality, rather it's a question of

1 policy. And not even that so much as a desire of the insurance
2 companies to best position themselves when they are negotiating
3 with their insureds. And to the extent that people want --
4 other parties might want to keep the insurance companies happy,
5 there might be some benefit in allowing them to have their
6 confidentiality agreements. Because they are the big kids on
7 the block.

8 And NCR's very able counsel has made a vigorous
9 argument on behalf of the insurance companies on their desire
10 to keep these settlement agreements confidential, but the issue
11 remains should the insurance companies' desire to keep their
12 negotiations secret trump the legitimate needs of the parties
13 to this litigation?

14 Now, of course, even the parties to the agreement
15 have implicitly recognized that perhaps that shouldn't be the
16 case because they have built in an escape hatch. They have
17 said that those confidentiality agreements are subject to an
18 escape clause, which is a court order. Well, this Court holds
19 the key to those handcuffs that they have voluntarily placed on
20 themselves.

21 I don't know if the availability of these
22 confidentiality agreements makes the insurance companies more
23 amenable to negotiations with their insureds or not. It sounds
24 like many times you still have to sue them to get them to honor
25 their insurance agreements, which they draft for the most part.

1 You still have to drag them through court. And then at the end
2 of the day, after a considerable amount of time and expense,
3 you work out some agreement with them as to what their policy
4 really meant. But only if you at that point agree to keep it
5 confidential. And maybe that confidentiality provision has
6 helped somehow. But, of course, they have obtained something
7 for that too. They have avoided the risk that a judge might
8 rule adversely to them. They haven't taken that to a final
9 determination in front of a judge.

10 I handle settlement conferences all the time, and
11 both parties usually want to avoid taking that final issue in
12 front of a judge for some reason. So they may very well agree
13 to settle some of those cases even if there are not settlement
14 agreements -- I'm sorry -- confidentiality agreements in those
15 settlement agreements for fear of how the courts might rule as
16 to whether or not they should honor some of those insurance
17 policies that they write and enter into. But that's all
18 speculation.

19 We come back to the question of whether the
20 self-imposed confidentiality agreements should trump the
21 interests of the parties here. And the parties here have
22 entered into a protective order that have allowed for the
23 exchange of these settlement agreements. And as I understand
24 it all parties entered into that. Georgia-Pacific has in fact
25 furnished its confidentiality -- I'm sorry -- its settlement

1 agreements pursuant to that order. So there's an argument that
2 it would seem fair that NCR be held to do the same.

3 I think we've all agreed that Rule 26(a)(1) by itself
4 does not require production of these settlement agreements. It
5 does require production of insurance agreements, but that is
6 read to me to read insurance policies, which is what the rule
7 was back in the 1990s. But apparently not any subsequent
8 agreements that may negate what the insurance policy says,
9 which is the point they tried to make during our discussion.
10 So the authors of the Federal Rules of Civil Procedure have
11 said it's important that these insurance policies be produced.
12 Those cannot be kept secret. We want disclosure. We don't
13 want surprises. We want the parties to be able to obtain
14 insurance policies that are germane to this lawsuit so both the
15 parties know what the insurance is that's out there, what
16 obligations are created by the insurance. But the rule does
17 not go so far as to require subsequent agreements that negate
18 that insurance policy, which renders the whole rule kind of
19 hollow if we were to stop there. But you're allowed to
20 continue to have discovery and ask for subsequent agreements
21 that would explain if that insurance policy has been rendered
22 hollow or not or somehow modified. And that's what's been done
23 here. There have been requests for production of documents and
24 interrogatories, and those subsequent agreements have been
25 requested. Clearly those policies have been modified. The

1 effect of it has been modified. They apparently are somewhat
2 complicated. There are 19 of them. Affecting a number of
3 policies in excess of 19.

4 Counsel has tendered the suggestion that they could
5 be briefly summarized in the aggregate, but I think the movant,
6 Georgia-Pacific, is entitled to the policies themselves to make
7 its own determination as to what they say. I'm going to grant
8 the motion in that regard.

9 I think these documents are relevant to determine the
10 ability of NCR to meet its potential burden, potential burden
11 at the end of the day as to paying for cleanup costs. NCR has
12 said it won't contest its ability. It's not going to put that
13 in issue. But the reality of the situation is that those costs
14 might be at issue. I'm sorry, its ability might be at issue.
15 It's a 4 1/2-billion-dollar company apparently as of yesterday.
16 Arguably cleanup could be a 2 1/2-billion-dollar project.
17 There could be costs worth 2 1/2 billion dollars according to
18 counsel, plus interest. And NCR might have other obligations
19 besides this one. If it truly got stuck for a bill for 2 1/2
20 billion dollars, that would substantially impact it. And we
21 are certainly finding out that some companies are not too big
22 to fail.

23 When I was younger there were some companies I knew
24 would never go under, but they don't exist today. My dad
25 always put his money in one particular stock brokerage and it

1 was a giant, but it would have gone under if it hadn't been
2 bought up by another company.

3 There are other companies that had to be failed out
4 by the federal government that were the biggest manufacturers
5 in the country or the world. There are a couple of companies
6 named by the plaintiff in this case that went bankrupt. And if
7 we think there are companies that are too big to fail and the
8 government will bail them out, after what happened a few years
9 ago, that might not be possible the next time around. The
10 public might not allow the next round to bail out companies
11 that are too big to fail. Who knows. But the very question
12 mark suggests that where you have damages in numbers that start
13 with a B, Georgia-Pacific is justified in exercising
14 due diligence to determine the assets available to a company
15 that it's seeking to obtain a judgment from. So I think it's
16 entitled to determine if NCR has the assets to meet a potential
17 judgment in this case.

18 Now, maybe NCR is not going to be held substantially
19 liable. It does look like there's some liability. And the
20 question then is really to what extent. But it could be
21 substantial. So I think it's entitled to these documents
22 because I think they are relevant as to NCR's ability to meet
23 any judgment. I think the only reason that they are not being
24 produced is a self-imposed confidentiality provision. The
25 Court can come to NCR's rescue and free it from the handcuffs

1 NCR put on itself, the Court provides that key. And whether
2 NCR wants to get out of those handcuffs or not, the Court is
3 going to open those handcuffs for it. So those documents
4 should be produced in the next 10 days.

5 Georgia-Pacific is entitled to costs in this case,
6 and I assume the parties can work that out. I'll give them
7 7 days to do that. In the event you cannot agree on costs
8 within 14 days, GP -- I'm sorry -- Georgia-Pacific should file
9 an affidavit and related documents or supporting documents as
10 to what it believes its costs are, and I'll give NCR seven days
11 thereafter to file responsive documents pertaining to costs.
12 The Court will decide that on papers, reserving the right for
13 further hearing if necessary.

14 Is there anything further we need, gentlemen?

15 *MR. NYFFELER:* No, Your Honor.

16 *MR. McATEE:* Your Honor, if I may, I had one
17 clarifying question. In producing the 19 settlement agreements
18 it would be our intent to redact amounts for other sites. A
19 lot of these agreements cover multiple things. And since this
20 is an argument about the Kalamazoo site and how much is
21 available for Kalamazoo, I would just ask that we be permitted
22 to redact out other sites.

23 *THE COURT:* Would that have any impact on calculating
24 the amounts available for the Kalamazoo site?

25 *MR. McATEE:* The answer to that is no, and if it

1 would, we wouldn't redact the information. Only if we could
2 redact out whatever the specific amounts for other places that
3 are not at issue in this case and are totally irrelevant.

4 *THE COURT:* Okay. Any problem with that, Counsel?

5 *MR. NYFFELER:* Well, Your Honor, they have
6 specifically said that the money was going to go first to
7 another site and whatever is left is for Kalamazoo. I may have
8 misspoken.

9 *THE COURT:* Well, that went to the indemnification
10 agreement.

11 *MR. NYFFELER:* Okay. I guess I just don't understand
12 why NCR cares. We have a confidentiality agreement in place.
13 I just don't understand.

14 *MR. McATEE:* The information is totally irrelevant.
15 It's about other sites. Some of those other sites these other
16 companies may be involved in. The protective order doesn't
17 prevent them from giving it to their clients. They can give it
18 to their coverage counsel. So it's a sensitive issue, and it's
19 totally irrelevant from this case.

20 *THE COURT:* I may have cut off Georgia-Pacific's
21 attorney when he was beginning to make an argument just now
22 about whether money would go to other sites first.

23 Were you going to make that argument, Counsel?

24 *MR. NYFFELER:* Your Honor, I guess my only concern is
25 simply I don't -- I don't pretend to know what these say, and I

1 don't know how they are going to affect how money is flowing to
2 the Kalamazoo or money will not be available to the Kalamazoo.
3 I just don't know.

4 *THE COURT:* I understood counsel to say that there
5 was a set amount of money that was being paid by the insurance
6 companies to NCR for Kalamazoo or for the Kalamazoo cleanup
7 under these agreements.

8 Is that correct?

9 *MR. McATEE:* So, Your Honor, I think each agreement
10 is different. But I think many of them cover more than one
11 site. So you might have a hundred dollars, you know, \$20 to
12 site A, \$30 to site B. All I'm asking is whether it's
13 permitted to just redact out the other sites. So they see \$10
14 to Kalamazoo but not the other provisions with respect to the
15 other sites. Because, again, it's totally irrelevant and it's
16 a very sensitive issue given that all of us are involved in
17 multiple sites with the same insurance companies. I would not
18 by way of redaction inhibit in any way their ability to
19 determine how much of the insurance was in fact for Kalamazoo.
20 I understand Your Honor has ordered that disclosed. I'm just
21 talking about completely irrelevant data.

22 *THE COURT:* I guess I don't see a problem with that
23 as long as there is no way that the other amounts or the
24 provisions of the settlement agreement could in any way impact
25 the Kalamazoo amount. So if it's percentages, certain

1 percentages go to one and that somehow their use or nonuse
2 would affect the percentage that went to Kalamazoo, that might
3 make a difference. I'm just speculating because I have no idea
4 how these things are drafted.

5 If you're simply redacting a set dollar amount that
6 went someplace else besides Kalamazoo, I don't have a problem
7 with it. But I suspect you should leave in whatever
8 methodology of how these amounts are arrived at and just redact
9 the dollar amount itself so there's no mystery that would cause
10 the other side to wonder "How does this impact Kalamazoo?"
11 Because that will just bring us right back here again, and I
12 would have a problem with that.

13 *MR. McATEE:* Understood, Your Honor, and I wasn't
14 suggesting that. I was suggesting doing the way you suggested.

15 *THE COURT:* Okay.

16 *MR. McATEE:* Thank you.

17 *THE COURT:* Counsel, I'll give you one last comment
18 on it.

19 *MR. NYFFELER:* I guess the only question I have,
20 Your Honor, is that we initially talked about there's
21 indemnification agreements and there's a certain amount of
22 money that's first going to be applied, as counsel said, to the
23 Fox River, and if anything is left to Kalamazoo. The concern
24 that I don't understand is -- there's essentially -- we're
25 talking about two different pools of money?

1 *THE COURT:* Are we talking about the indemnification
2 agreement now or the settlement agreements?

3 *MR. NYFFELER:* I'm talking about both. Because there
4 could be some money from indemnification that goes to Fox and
5 then to Kalamazoo. But we don't know that. And if -- I don't
6 know what order that money is going to be applied, so if -- I
7 mean, is the indemnification money first in line to pay
8 anything in the Fox, or is it after the insurance agreements?
9 If it's after the insurance agreements, then more money will
10 come back to the Kalamazoo. I guess I just don't understand
11 the interplay between the different pools of money because we
12 have indemnification and insurance, and I just don't understand
13 how this money is going to be available and when. I'm not
14 necessarily trying to pry, I just -- I don't understand this
15 kind of stuff. I just don't get it.

16 *THE COURT:* First of all, you ought to be prying
17 because that's what discovery is all about.

18 *MR. NYFFELER:* Well, but . . .

19 *THE COURT:* Putting aside the semantics of it. The
20 indemnification agreement as I understand it does not redact
21 anything that pertains to the amount of money available for
22 Kalamazoo. And again, if they redacted anything that pertained
23 to the methodology of the amount of money that's going to end
24 up in Kalamazoo, I think we would have the same problem. And
25 so we come back to the issue of, well, how much money is

1 available for the Fox River cleanup and then what's left over
2 goes to Kalamazoo, doesn't that become problematic? How do we
3 handle that, Counsel? Here I'm addressing NCR, of course.

4 *MR. McATEE:* If we're talking about the funding
5 agreement --

6 *THE COURT:* Yes.

7 *MR. McATEE:* -- that was executed in September of
8 2014 --

9 *THE COURT:* Yes.

10 *MR. McATEE:* -- it would be our intention for that
11 agreement to show the Fox River amounts and then the provisions
12 that leave it over for Kalamazoo. So they would have full
13 disclosure of that.

14 *THE COURT:* All right. Then I don't have a problem
15 with that.

16 As far as the settlement agreements are concerned, I
17 think counsel made it clear that he was only going to redact
18 the dollar amounts and how -- there would be no mystery as to
19 how the parties got to those dollar amounts, but as to the
20 actual dollar amounts that went to the other cleanup sites that
21 did not pertain to this lawsuit or this Kalamazoo River, those
22 would be redacted. And you wouldn't need those.

23 *MR. NYFFELER:* That's acceptable, Your Honor.

24 *THE COURT:* All right. Agreeable?

25 *MR. McATEE:* Agreed, Your Honor. Thank you.

1 THE COURT: All right. Thank you, gentlemen. Have a
2 good day.

3 THE CLERK: All rise. Court is adjourned.

4 *(Proceeding concluded at 11:36 a.m.)*

5 * * * * *

6 CERTIFICATE

7 I certify that the foregoing is a transcript from the
8 Liberty Court Recording System digital recording of the
9 proceedings in the above-entitled matter, transcribed to the
10 best of my ability.

11
12 November 1, 2014

13
14 /s/ Glenda Trexler
15 Glenda Trexler, CSR-1436, RPR, CRR
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